

1 UNITED STATES DISTRICT COURT  
2 CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION  
3 HONORABLE DALE S. FISCHER, U.S. DISTRICT JUDGE  
4 - - -  
5  
6  
7 )  
8 MOTOR VEHICLE SOFTWARE )  
9 CORPORATION, )  
10 PLAINTIFF, )  
11 vs. ) No. CV17-896-DSF (AFMX)  
12 CDK GLOBAL, INC., ET AL., )  
13 DEFENDANTS. )  
14  
15 REPORTER'S TRANSCRIPT OF PROCEEDINGS  
16 LOS ANGELES, CALIFORNIA  
17 MONDAY, JANUARY 8, 2018  
18 1:19 p.m.  
19  
20  
21  
22  
23 CINDY L. NIRENBERG, CSR 5059, FCRR  
24 U.S. Official Court Reporter  
25 350 W. 1st Street, #4455  
Los Angeles, CA 90012  
www.msfdreporter.com

1 APPEARANCES OF COUNSEL (CONTINUED):  
2  
3 FOR THE DEFENDANT THE REYNOLDS AND REYNOLDS COMPANY:  
4 GIBBS & BRUNS  
5 BY: AUNDREA K. GULLEY, ATTORNEY AT LAW  
6 1100 LOUISIANA STREET  
7 SUITE 5300  
8 HOUSTON, TX 77002  
9 713-650-8805  
10  
11 SHEPPARD MULLIN RICHTER & HAMPTON  
12 BY: LEO D. CASERIA, ATTORNEY AT LAW  
13 333 SOUTH HOPE STREET  
14 43RD FLOOR  
15 LOS ANGELES, CA 90071  
16 213-620-1780  
17  
18  
19  
20  
21  
22  
23  
24  
25

2

1 APPEARANCES OF COUNSEL:  
2  
3 FOR THE PLAINTIFF:  
4 GABRIEL SALOMONS  
5 BY: GARY K. SALOMONS, ATTORNEY AT LAW  
6 16311 VENTURA BOULEVARD  
7 SUITE 970  
8 ENCINO, CA 91436  
9 818-906-3700  
10  
11 KELLOGG HANSEN TODD FIGEL & FREDERICK  
12 BY: MICHAEL N. NEMELKA, ATTORNEY AT LAW  
13 1615 M STREET NW  
14 SUITE 400  
15 WASHINGTON, DC 20036  
16 202-326-7900  
17  
18 FOR THE DEFENDANTS CDK AND CVR:  
19 MAYER BROWN  
20 BY: BRITT M. MILLER, ATTORNEY AT LAW  
21 71 SOUTH WACKER DRIVE  
22 CHICAGO, IL 60606  
23 312-782-0600  
24  
25 MAYER BROWN  
BY: JOHN NADOLENCO, ATTORNEY AT LAW  
350 SOUTH GRAND AVENUE  
25TH FLOOR  
LOS ANGELES, CA 90071  
213-229-9500  
MAYER BROWN  
BY: MARK W. RYAN, ATTORNEY AT LAW  
1909 K STREET NW  
WASHINGTON, DC 20006  
202-263-3338

4

1 LOS ANGELES, CALIFORNIA; MONDAY, JANUARY 8, 2018  
2 1:19 P.M.  
3 - - - -  
4 THE CLERK: Calling item Number 16, CV17-896, Motor  
5 Vehicle Software Corporation versus CDK Global, Inc., et al.  
6 THE COURT: Plaintiffs on the side of the jury  
7 (indicating), unless the defense has the burden of proof, in  
8 which case, it's switched.  
9 All right. Counsel, your appearances.  
10 MR. SALOMONS: Good afternoon, Your Honor. Gary  
11 Salomons of Gabriel Salomons for the plaintiff.  
12 MR. NEMELKA: Michael Nemelka from Kellogg Hansen on  
13 behalf of the plaintiff.  
14 MR. RYAN: Mark Ryan from Mayer Brown on behalf of  
15 the defendant CDK and the defendant CVR.  
16 MS. MILLER: Good afternoon, Your Honor. Britt  
17 Miller of Mayer Brown on behalf of defendant CDK Global and  
18 defendant CVR.  
19 MR. NADOLENCO: John Nadolenco also of Mayer Brown on  
20 behalf of defendants CDK and CVR.  
21 MS. GULLEY: Good afternoon, Your Honor. Aundrea  
22 Gulley from Gibbs & Bruns on behalf of defendant The Reynolds  
23 and Reynolds Company.  
24 MR. CASERIA: And Leo Caseria from Sheppard Mullin  
25 Richter & Hampton on behalf of the defendant, The Reynolds and

1 Reynolds Company.  
 2 THE COURT: Okay. Is this case going to an MDL?  
 3 MS. MILLER: Yes, Your Honor.  
 4 MR. NEMELKA: Possibly.  
 5 THE COURT: So why are you bothering me? I have  
 6 enough to do.  
 7 MS. MILLER: Your Honor, we've moved for a  
 8 consolidation of this and a number of cases.  
 9 THE COURT: We stand when we speak to the Court in  
 10 federal court.  
 11 MS. MILLER: I apologize, Your Honor.  
 12 We have moved for consolidation of this case and a  
 13 number of other cases before the JPML, and the JPML is  
 14 scheduled to have a hearing on the matter on January 25th.  
 15 THE COURT: So what is your position on whether I  
 16 should rule?  
 17 MS. MILLER: Your Honor, we are perfectly happy to  
 18 have Your Honor rule on the motion to dismiss, but with respect  
 19 to the scheduling order, we think Your Honor should hold off on  
 20 scheduling any discovery or further proceedings until it can be  
 21 coordinated as part of the MDL because discovery should be  
 22 coordinated with the other cases.  
 23 THE COURT: Well, then that will go to some other  
 24 judge because nobody's even asked me to handle it.  
 25 MS. MILLER: Yes, Your Honor.

1 plaintiff. And, please, everybody, for my sake and the court  
 2 reporter's, before you speak, repeat your name again.  
 3 I'll hear from the plaintiff.  
 4 Tell me exactly what was changed from the previous  
 5 complaint so I make sure both of you and the Court are at least  
 6 close to being on the same page.  
 7 MR. NEMELKA: Absolutely. Michael Nemelka from  
 8 Kellogg Hansen on behalf of plaintiff.  
 9 There are two primary changes in order to address the  
 10 issues in the Court's prior ruling. The first is changes with  
 11 respect to the allegations on CDK's substantial control over  
 12 CVR such that CDK is considered a competitor in the EVR  
 13 markets, and those are at paragraphs 56 through 60.  
 14 And the allegations there that were added make very  
 15 clear that CVR, which is 80 percent owned by CDK, 20 percent by  
 16 Reynolds, is -- that CDK has a substantial control over CVR.  
 17 THE COURT: You're not claiming Reynolds anymore?  
 18 MR. NEMELKA: For purposes of competing in the EVR  
 19 market, no. The Section 2 monopolization claim is just against  
 20 CDK and CVR.  
 21 THE COURT: Well, is there another purpose for which  
 22 you're claiming something different?  
 23 MR. NEMELKA: Excuse me, Your Honor?  
 24 THE COURT: Is there another purpose for which you're  
 25 claiming something different?

6

1 THE COURT: There are some cases now already  
 2 coordinated; is that right?  
 3 MS. MILLER: No, Your Honor. There are eight cases  
 4 that have been filed in five different jurisdictions around the  
 5 country: Several jurisdictions in the Western District of  
 6 Wisconsin, this one here, one in Illinois, one in Mississippi  
 7 and several in New Jersey.  
 8 THE COURT: So where is the proposal for it to go?  
 9 MS. MILLER: We have asked for consolidation in the  
 10 Northern District of Illinois. Some of the other parties have  
 11 asked for consolidation in the Western District of Wisconsin  
 12 and others have asked for the District of New Jersey.  
 13 THE COURT: Okay.  
 14 MR. NEMELKA: Your Honor, on behalf of the MVSC, we  
 15 have put forth a vigorous paper before the MDL panel that MVSC  
 16 should not be consolidated with the other cases --  
 17 THE COURT: Well, if it's vigorous, I'm sure --  
 18 MR. NEMELKA: Yeah.  
 19 -- given the unique conspiracy at issue here that is  
 20 not at issue in the other cases.  
 21 THE COURT: So you're suggesting just this case  
 22 remain separate?  
 23 MR. NEMELKA: That this case remain separate here and  
 24 stay in this Court, yes.  
 25 THE COURT: All right. So I'll hear from the

8

1 MR. NEMELKA: Well -- and then there's also the  
 2 Section 2 conspiracy to monopolize claim in which we still  
 3 include Reynolds because of the conspiracy to monopolize those  
 4 CVR markets, but the actual --  
 5 THE COURT: That's a different issue from substantial  
 6 control?  
 7 MR. NEMELKA: Correct.  
 8 THE COURT: Okay. So, again, my question was is  
 9 there another purpose for which you're claiming something  
 10 different? I meant with regard to substantial control.  
 11 MR. NEMELKA: No. It is about that CDK is properly  
 12 considered a competitor in the EVR market, given their  
 13 substantial control over CVR.  
 14 THE COURT: Okay.  
 15 MR. NEMELKA: And the allegations that were added  
 16 made clear that CDK doesn't just own 80 percent of CVR, doesn't  
 17 just roll up its finances in CDK's own financials, but that  
 18 they actually control the day-to-day operations and make hiring  
 19 and firing decisions at CVR. They make day-to-day operating  
 20 decisions in terms of where they should market. They go on --  
 21 they go on marketing visits with CVR to dealerships.  
 22 CVR executives have CDK email addresses. CDK posts  
 23 job listings for CVR. They share physical offices on the same  
 24 floor. Their top executive at CVR is also an executive at CDK.  
 25 Under the cases we've cited, it clearly establishes

substantial control for purposes of the Section 2 monopoly claims.

THE COURT: All right. And what other changes?

MR. NEMELKA: Then the second primary changes are with respect to the conspiracy allegations with respect to CVR participating in the conspiracy to block MVSC from the programs, and those are at paragraphs 109 through 114.

And to address Your Honor's statement in the prior ruling that there had not been sufficient allegations that CVR itself participated in conspiratorial conversations to block MVSC, we had additional facts that we learned that at these board of director meetings for CVR, on which both CDK and Reynolds representatives sit, they specifically discussed -- and this is a former board member that admitted, as stated in the complaint, to MVSC in a private conversation that they not only discussed MVSC, but that they discussed needing to keep MVSC at a disadvantage with respect to data access, which is the group boycott that they will not allow MVSC to participate in their data access programs, which is absolutely necessary to provide the services at issue here.

We named the CVR executives who were involved, and so we added -- and we also added allegations that internal presentations at CDK -- we had alleged as much, but we found out after -- their internal presentations at CDK, at which CVR participated, to specifically state EVR is a closed category to

that as owners of CVR, CDK and Reynolds control -- CDK and Reynolds control CVR.

The current allegations that for purposes of the substantial control test that they actually --

THE REPORTER: Can you slow down, please.

MR. NEMELKA: Okay. Thank you. I apologize.

It was a general statement in the complaint that as owners -- joint owners of CVR, they controlled it.

Here we made clear that CDK is the parent that actually exercises the substantial control over the day-to-day operations of CVR, so we don't view them as being inconsistent.

THE COURT: All right. And with regard to Reynolds, do you agree there's no new allegations with regard to conversations?

MR. NEMELKA: We do not.

THE COURT: And where are the new allegations?

MR. NEMELKA: Paragraph 109 and 110, which specifically describe the conversations that were had at CVR board of director meetings where Reynolds had representatives.

And at these board of director meetings, they specifically discussed the need to keep MVSC at a disadvantage. And this board member who told us this also said that board members recognize that MVSC out-competed CVR with respect to technology and services, and so the board members, including Reynolds, agreed that CVR needed a competitive advantage as

10

competitors of CVR, that, "We will not let them in unless they participate in a territory not at interest to CVR," meaning in states where CVR does not operate.

THE COURT: So in the allegations, I did not take the time, frankly, to figure out whether the persons whom you named were just CVR or whether they were also CDK employees, officers, whatever you want to call them, so --

MR. NEMELKA: So in paragraph 111, Scott Herbers was not only CVR's general manager but also vice president at CDK.

Jim Quinlan, who is the current CVR general manager, the complaint does not allege that he has current responsibilities at CDK. But Scott Herbers, who was the general manager at CVR for much of the time at issue in the complaint, was also a vice president at CDK.

THE COURT: Yeah, but the point would be how do I know who they're representing or speaking on behalf of if they're both. So who is it who wasn't a member of CDK but was of CVR?

MR. NEMELKA: At least John Roeder and possibly Jim Quinlan. That's in paragraph 111.

THE COURT: Okay. All right. And we talked briefly about Reynolds and you've changed your position with regard to the allegations of control. Do you just get to do that and change your mind?

MR. NEMELKA: Well, in the complaint before, it was

12

compared to MVSC regarding access to dealer data. That is in paragraph 110.

THE COURT: Is there anything else you want to point out?

MR. NEMELKA: We think with those two -- you know, those two substantive topics that were bolstered, we believe that we do state a claim under Section 2.

THE COURT: All right. I'll hear from defense.

MR. RYAN: Good afternoon again, Your Honor. Mark Ryan from Mayer Brown on behalf of defendant CVR and defendant CDK Global.

And let me turn to CVR first, if I might. The Court ruled earlier that with respect to CVR and the monopolization and attempted monopolization claims -- those are Counts Two and Three of the Complaint -- that the plaintiffs had not alleged sufficient anticompetitive conduct by CVR to establish a claim. In the amended complaint, they don't add to those allegations at all.

And we pointed out in our motion to dismiss the amended complaint that they just hadn't done anything to fix the problem, the deficiency that had been identified by the Court, and they don't challenge that in their briefs.

So on Counts Two and Three, CVR is a defendant, and they haven't fixed the deficiencies that the Court identified so those should be dismissed as to CVR.

Now, Count Four is the conspiracy to monopolize claim that now goes against all three defendants.

So CVR is owned 80 percent by CDK and 20 percent by Reynolds. As a matter of law, as we point out in our briefs, CDK, as the 80 percent owner, is incapable of conspiring for Section 1 purposes with CVR.

And the same principles apply to conspiracy allegations under Section 2. So you have -- under the Copperweld case, you have a partnership, an entity that CDK controls 80 percent of, and it simply can't conspire with CVR. So that part of Count Four, the conspiracy to monopolize claim against CVR, should be out.

Now, as to Reynolds -- and I'm not arguing on behalf of Reynolds, but with respect to CVR and Reynolds, they have alleged quite clearly that Reynolds also controls and has a common economic interest with CVR. And our position is under the same principles that govern -- of Copperweld apply to Section 2 conspiracy claims. There can't be a statement of agreement, a conspiratorial agreement, between Reynolds and an entity that Reynolds also controls, CVR.

So those are the claims against CVR, the two that they didn't address and then the conspiracy to monopolize claims that are defective as a matter of law.

And then the state claims are derivative of the federal claims. So if the federal claims go against CVR, the

something -- there's something amiss, there's something bad afoot where we're intentionally trying to use the corporate forum to avoid responsibility for actions that we are, in fact, taking, and there's no allegation of that here.

CVR's a legitimate joint venture. The allegations that suggest that we exercise day-to-day control, really when you look at them -- and there's a chart in our opposition and motion to dismiss that summarizes the allegations -- all they're saying -- all they're saying is, "We exercise supervision. We exercise our rights to look out for our investment in the company, and at times we coordinate with them when we approach certain customers because, of course, they're our customers, too, because we sell these DMS services to the same auto dealers that CVR is selling services to."

So that's the one issue on Counts Two and Three.

The second issue is in order to hold us liable for monopolization or attempted monopolization, they've got to allege a predatory act, some anticompetitive act by CDK.

And what is that act? We won't cooperate with them. We won't make it easier for MVSC -- there's a lot of initials in this case, Your Honor -- we won't make it easier for MVSC to compete. We won't extend them a helping hand and allow them access to our DMS systems.

There is -- in current state of Section 2 law, there is no obligation for us to deal with them. The only

14

state claims go as well.

THE COURT: All right. Thank you.

MR. RYAN: So I'll let --

I apologize for the confusion. Mark Ryan again.

As to CDK -- just as to CDK -- and I won't repeat the conspiracy allegations, the theory now on Counts Two and Three, monopolization and attempted monopolization, previously the Court ruled that because CDK does not compete in the EVR markets in Illinois and California, you cannot state a Section 2 claim. Plaintiffs cannot state a Section 2 claim against CDK. They're not a competitor, not subject to Section 2, liability for monopolization or attempted monopolization.

So now their theory is, well, because CDK controls CVR, whatever CVR does -- CDK is a competitor because of that control, and our view, Your Honor, is that that's simply not the law. Our ownership of, our 80 percent control of, of CVR does not give rise to a claim that we are CDR -- CVR, I'm sorry -- CVR for Section 2 purposes.

It's a very high standard under the cases that we cite and under basic principles of corporate law to disregard that corporate forum where we exist separately -- we, CDK, exist separately from CVR.

And those few cases that talk about attributing our CVK's business -- CDK -- CVR's business to us, it's very rarely done, and you have to have some allegation that somehow

16

circumstance which courts recognize today grows out of the Aspen case, which I know the Court is familiar with, is if there's a pre-existing, profitable course of dealings and somehow we -- we cut them off and we sacrifice short-term profits for the longer goal of putting them out of business. We had no pre-existing course of dealings with them. There's no allegation that we've ever dealt with them because we haven't.

And, again, under Trinko and I think the Aerotec case that we cite from the Ninth Circuit -- and I think we cite some other cases, too, Your Honor. It's not Live -- it's Live Universe. It's not Live Nation. It's Live Universe, Your Honor, an unpublished opinion, but it lays out -- of the Ninth Circuit, but it lays out the principles that we think govern here in recognizing several other circuits.

So with that, Your Honor, if the Court doesn't have any questions, I'll yield to counsel for Reynolds. Thank you.

THE COURT: All right. Thank you.

MS. GULLEY: Thank you, Your Honor.

Reynolds and Reynolds is in on only Counts One and Four, so at this point they're in on the conspiracy allegation under Section 1 with CDK, as well as on claim 4 under Section 2 for conspiracy to monopolize through CVR, so -- I should say on the federal side and then the corresponding state claims as well.

Just to back up for a second, we kind of dove into how's your claim different and jumped from there into CVR's response to that, but circling back around, just to kind of set the stage for what this case is really about, you know, these are sophisticated computer systems that run the whole back office of dealerships.

It's not like a database or a data warehouse or data switching center. It's a computer system that runs all of the accounting and all that for dealerships. And so, you know, access to these systems by anyone, hackers or vendors or third parties, has serious consequences the same way that giving your user name and password to your laptop would have consequences in terms of both how would that work if somebody was running it at the same time as you or just the security of your system, obviously.

So this isn't about unilateral conduct. Right?

Mr. Ryan was mentioning about the right to refuse access to a computer system. Right? Trinko explains clearly that that's beyond dispute. Reynolds can deny access if it wants to deny access.

So then that brings us to the claims that MVSC -- or I should say plaintiff maybe is an easier way to deal with these initials -- has brought.

On the conspiracy to monopolize claim against Reynolds, the only entity that can monopolize -- it has to be

conspiracy or is it a real thing that they don't otherwise have a competing interest in, as the NFL teams did in American Needle.

Here it is exactly the kind of entity that the antitrust laws support and encourage. It's a totally separate business relating to the EVR market in which neither company competed before that was created for that purpose of venturing into the EVR market. It's a pro-competitive business with a single economic focus. Reynolds doesn't have some other EVR interests separate from this, like the NFL teams did in American Needle.

So, in other words, under the state of the Supreme Court precedent, Reynolds cannot conspire with CVR.

MVSC warns in its briefs of allowing competitors to hide conspiracies and joint ventures, but, actually, the opposite is true. If this were not the rule, if you couldn't form legitimate pro-competitive businesses, every agreement would be a conspiracy, and that's obviously not the rule.

And this is exactly -- what MVSC warns of is exactly what did not happen here. There wasn't some conspiracy to do anything with respect to CVR. In fact, that's why the First Amended Complaint came about is because MVSC needed to find some other market to talk about, the DMS market, but with respect to the EVR market, there's been no allegations that Reynolds could, would or has or had any reason to conspire with

18

one, not two or three -- is CVR in the EVR market.

Even if Reynolds could conspire with itself, with its own joint venture, it's not alleged to have done so. There are no new allegations of conspiratorial conversations.

Mr. Nemelka pointed to paragraphs 109 and 110, but the Court has already discussed the weight of conversations at board meetings, and that's all those are. It doesn't describe who was at the board, what Reynolds representative or representatives or when. And the when of this conspiracy is important because the acts alleged to have been committed by Reynolds occurred only in 2014. Those are -- those allegations occur in paragraphs 126, 127 and 165 of the Second Amended Complaint.

Reynolds has not alleged to have committed some acts that are alleged to be in restraint of trade after 2014. So we do need to know when were these meetings and who was there from Reynolds. Were they acting for Reynolds or were they there as members of the board as alleged in these paragraphs acting on behalf of CVR.

But in any event, Reynolds really can't conspire with CVR because that's what the case that plaintiff cites over and over, American Needle, is really about. The rule of Copperweld and American Needle is that we look at the reality of what is this JV. Are they trying to shelter -- are competitors CDK and Reynolds trying to shelter a way to set prices or some

20

its own JV CVR.

The only other claim that Reynolds is in on and has moved to dismiss is the Section 1 conspiracy claim, which has now alleged agreement with CDK to block MVSC.

The elements of a Section 1 conspiracy are the existence of a conspiracy, the intention to restrain trade and the actual injury to competition.

Obviously, Reynolds disputes the existence of a conspiracy vigorously, or whatever the phrase is, but even if you assume for purposes of this hearing that there was otherwise an existence of a conspiracy between Reynolds and CDK, MVSC -- even if you assume they have plausibly pled that in light of the timing considerations that I pointed out earlier, the Computer Fraud and Abuse Act and California Computer Crime Act or Section 502 really take out the second and third elements.

You cannot be liable for restraining an illegal trade. This is not an unclean hands argument. It is not an in pari delicto argument. It's not any argument about anyone's motives or state of their heart. It is simply the state of the law that you cannot be liable for restraining trade that is otherwise illegal.

And, likewise, the flip side of the same coin as it relates to actual injury to competition, is that when you -- when the thing that is preventing you from restraining trade is

21  
1 something that is prohibited by law, there is a break in the  
2 chain of causation of that injury.

3 So, in other words, this is a computer system. The  
4 Computer Fraud and Abuse Act is actually very simple and  
5 straightforward, and the Ninth Circuit has a beautiful case,  
6 the Facebook case, that lays it out very specifically. The  
7 Supreme Court recently denied cert in that case. When the  
8 access is without authorization, it is a violation of the  
9 Computer Fraud and Abuse Act.

10 MVSC admits that the acts are not authorized by  
11 Reynolds. In fact, they pleaded affirmatively repeatedly that  
12 they're not authorized to do it. That's one of the pieces of  
13 the alleged conspiracy, in fact, so it's affirmatively pled.

14 They admit that this lack of access to Reynolds'  
15 proprietary computer system, the fact that they cannot trespass  
16 on Reynolds computer system, is the basis of their claim. That  
17 is where their damages come from; they cannot access the  
18 computer system.

19 In other words, the violation -- it's not that I'm  
20 standing here saying I can prove to you right now that on this  
21 record that there is a CFAA violation by MVSC. What I'm saying  
22 is the basis of their claim is something that is illegal. They  
23 want to do something that they affirmatively plead is illegal  
24 under the Computer Fraud and Abuse Act, and that just can't  
25 form the basis of an antitrust claim because it's a restraint of

1 CDK and Reynolds are not able to get together and conspire, and  
2 that is the claim that is already going forward.

3 On the unilateral to deal, we cite many cases where a  
4 product is freely offered. There is no requirement of the  
5 pre-existing course of dealing. Otter Tail, the Supreme  
6 Court's very case that Trinko acknowledged that that is not  
7 necessary and we discuss in our brief, make that very clear.

8 Here CDK offers on -- to the market, "Come to us and  
9 you can get data over which we have control. Nobody else can  
10 provide you access to this data but us.

11 So MVSC comes, "Okay. Can we please participate?"

12 "No, you can't."

13 "Why?"

14 "Because you compete with CVR."

15 We found out and we go to Reynolds. "Can we join  
16 your program so we can get your data?"

17 Reynolds says, "No, you can't."

18 There's no other place to get the data for MVSC to  
19 compete with CVR that they would agree with. That conspiracy  
20 between them, which this Court has already allowed to go  
21 forward, is the anticompetitive means for the Section 2 claim,  
22 and that's why the substantial control is important is because  
23 CDK is considered under the antitrust laws to compete.

24 And I would -- Mr. Ryan says there's no case where --  
25 Mr. Ryan said that there's no case where a court has held that

22

1 trade that's an illegal trade and there's a break in the chain  
2 of what's causing their problem. Their problem is we don't  
3 have to do this and the law prevents it.

4 You've let me go on long enough. Thank you.

5 THE COURT: Thank you. Anything further?

6 MR. NEMELKA: Thank you, Your Honor. Mike Nemelka.  
7 Listening here, it's as if they're ignoring this  
8 Court's ruling on the Section 1 claim already.

9 CDK and Reynolds are two competitors that absolutely  
10 are able to conspire, and that is the group boycott that is at  
11 issue in the Section 1 claim that this Court under these  
12 allegations has already denied their motion to dismiss.

13 And -- so Reynolds' counsel talking about the CFAA  
14 and antitrust injury, the injury that MVSC has suffered is  
15 because they have agreed to block MVSC from their programs. It  
16 has nothing to do with getting data from anywhere else. Their  
17 argument is completely irrelevant.

18 And then it also goes to Mr. Ryan's point in terms of  
19 anti-competitive conduct to achieve the monopoly. A violation  
20 of Section 1 is the quintessential anticompetitive means of  
21 achieving a monopoly. CDK and CVR conspiring to block MVSC is  
22 the anti-competitive conduct that allowed CVR, which is  
23 substantially controlled by CDK, to obtain their monopoly.

24 So putting aside this unilateral to deal, it's  
25 irrelevant. Yes, we still allege it and we can meet it, but

24

1 a parent can be considered a competitor in a subsidiary's  
2 market. The Ninth Circuit in Crocker said -- I would just like  
3 to read it for this Court.

4 "As meaning that" --

5 "To interpret the antitrust laws as meaning that  
6 the" --

7 THE REPORTER: Slow down, please.

8 MR. NEMELKA: Okay. I won't do it. Okay.

9 THE COURT: You can't speed along.

10 MR. NEMELKA: Okay. It's just incorrect.

11 The Ninth Circuit in Crocker stated, "To interpret  
12 the antitrust laws as meaning that the business activity of the  
13 subsidiary can never be considered the parent as a competitor  
14 would assume that congress intended to permit such a simple and  
15 obvious means after avoidance as to render the statute  
16 meaningless."

17 So --

18 THE COURT: All right. Thank you.

19 And the hearing on the MDL is when?

20 MR. NEMELKA: Your Honor, the hearing on the MDL is  
21 January 25th in Miami.

22 THE COURT: Well, I hope it stops snowing by then.

23 I'm going to go ahead and set dates because otherwise  
24 I will lose track of your case, if, in fact, it's my case, too.  
25 Lose track of or keep track of, as the case may be.

1 I'm going to do what I always do, which is -- or  
 2 almost always do -- set the later dates because everybody comes  
 3 in, asks for a continuance anyway.  
 4 If any of these falls on the wrong day of the week,  
 5 Ms. Plato will fix it when she sends out my order.  
 6 I suppose you should put off discovery at least until  
 7 the 25th when you find out what's going on.  
 8 And I don't know what the MDL will do. I'm not sure  
 9 if they're stuck with my ruling if it goes there. So I think  
 10 you probably should not engage in discovery until at least you  
 11 get my ruling and find out what the MDL is going to do.  
 12 So May 31, 2019, for trial. And, yes, the 17200  
 13 claims, if they remain, are not going to be tried to a jury.  
 14 May 3, 2019, for pretrial conference and hearing on  
 15 motions in limine.  
 16 April 19 for -- I guess you decided to tinker with my  
 17 form, so all of those things that you've listed, April 12th, as  
 18 well, for the category of things.  
 19 Last day to conduct an ADR proceeding, March 8, 2019.  
 20 I'm going to order you to outside ADR.  
 21 Last day for hearing motions, February 22, 2019.  
 22 I'm not sure what you were doing with these other  
 23 dates, but that's fine with me.  
 24 If you want to internally set dates for briefing, so  
 25 long as I have at least two weeks between your reply brief and

1 MS. GULLEY: Thank you, Your Honor.  
 2 MS. MILLER: Thank you.  
 3 MR. NEMELKA: Thank you, Your Honor.  
 4 *(Proceedings concluded 2:11 p.m.)*  
 5 --oOo--  
 6  
 7  
 8  
 9  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

26

28

1 the hearing -- and on this case, probably more than that would  
 2 be helpful -- on a summary judgment motion so you can get the  
 3 answer before you have to start preparing too much by way of  
 4 pretrial documents.  
 5 Fact and expert discovery cutoff, September 21, 2018,  
 6 for experts, July 20, 2018, for facts.  
 7 Last day to serve rebuttal expert reports, September  
 8 7, 2018.  
 9 Last day to serve response expert reports, August 17.  
 10 Last day to serve initial expert reports, July 13.  
 11 Last day to amend pleadings or add parties -- I don't  
 12 know what that means. Don't tell me "as per federal rules."  
 13 That means I have to go look it up. That's why I said add a  
 14 date. What date do you want?  
 15 MS. GULLEY: Your Honor, I believe that our problem  
 16 was not knowing when we'd answer.  
 17 THE COURT: Oh, pick a day.  
 18 MS. GULLEY: I mean, after the ruling on the motion  
 19 to dismiss. Okay. So --  
 20 *(Counsel confer off the record.)*  
 21 MS. GULLEY: Would 14 days after the ruling on the  
 22 motion to dismiss be okay?  
 23 THE COURT: Okay. That's fine. Anything else?  
 24 MS. MILLER: No, Your Honor.  
 25 THE COURT: All right. Thank you.

1  
 2  
 3 CERTIFICATE  
 4  
 5 I hereby certify that pursuant to Section 753,  
 6 Title 28, United States Code, the foregoing is a true and  
 7 correct transcript of the stenographically reported  
 8 proceedings held in the above-entitled matter and that the  
 9 transcript page format is in conformance with the  
 10 regulations of the Judicial Conference of the United States.  
 11  
 12 Date: JANUARY 16, 2018  
 13  
 14  
 15  
 16  
 17 /s/ Cindy L. Nirenberg, CSR No. 5059  
 18 Official Court Reporter  
 19  
 20  
 21  
 22  
 23  
 24  
 25